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No. 15-375

In the Supreme Court of the United States

SUPAP KIRTSAENG, DBA BLUECHRISTINE99, PETITIONER

v.

JOHN WILEY & SONS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the district court abused its discretion under 17 U.S.C. 505, which permits an award of attorney's fees to a prevailing party in a civil action under the Copyright Act of 1976, by giving "substantial weight" in its analysis to the objective reasonableness of the losing party's position.

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Ralph S. Brown, Jr., *Study No. 23, The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study, reprinted in* Staff of the Subcomm. on Patients, Trademarks, and Copyrights, House Comm. on the Judiciary, 86th Cong., 2d Sess., *Copyright Law Revision: Studies* (Comm. Print 1960) 17, 19
1 Mary Frances Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* (2015) 20
6 William F Patry, *Patry on Copyright* (2015) 27

Miscellaneous—Continued: Page

Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (Comm. Print 1961) 17

Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651 (1982) 20

John Tehranian, *Curbing Copyblight*, 14 Vand. J. Ent. & Tech. L. 993 (2012) 26

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INTEREST OF THE UNITED STATES

This case involves the interpretation of 17 U.S.C. 505, which authorizes district courts to award attorney's fees in suits under the Copyright Act of 1976, 17 U.S.C. 101 *et seq.* (Copyright Act). Several federal agencies have an interest in the practical operation of the copyright system and in the proper interpretation of the copyright laws. See, *e.g.*, 17 U.S.C. 701 (Copyright Office); 35 U.S.C. 2(b)(8) and (c)(5) (Patent and Trademark Office). The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

The question presented in this case concerns the criteria that a district court should consider in deciding whether to award attorney's fees to a prevailing party in a civil action under the Copyright Act. The

district court denied the fee request at issue here, and the court of appeals affirmed. In determining whether fees should be awarded, both courts applied an approach that gives substantial weight to the reasonableness of the losing party's arguments on the merits, while also mandating consideration of all relevant circumstances and recognizing that an award of fees may be proper even if the losing party's position was reasonable. See Pet. App. 4a-5a, 13a-14a.

1. a. The Copyright Act grants copyright protection to "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. 102(a); see U.S. Const. Art. I, § 8, Cl. 8 ("Congress shall have Power" to "promote the Progress of Science * * * by securing [to Authors] for limited Times * * * the exclusive Right to their * * * Writings"). Copyright protection confers on the author of an original work certain exclusive statutory rights, including the rights to copy, distribute, and display the work. 17 U.S.C. 106; see 17 U.S.C. 109(a).

The "owner of an exclusive right under a copyright" that has been registered with the Copyright Office "is entitled * * * to institute an action for any infringement of that particular right committed while he or she is the owner of it." 17 U.S.C. 501(b); see 17 U.S.C. 411. A prevailing plaintiff in such a suit "is entitled to recover * * * actual damages" or statutory damages and may also seek injunctive remedies. 17 U.S.C. 504; see 17 U.S.C. 502-503.

For more than 100 years, U.S. law has authorized trial courts to award costs and attorney's fees to the prevailing party in a copyright suit. The Copyright Act of 1909 provided that "in all actions, suits, or proceedings under this Act, except when brought by or

against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs." Ch. 320, § 40, 35 Stat. 1084. That provision was carried forward in 1947, when the Copyright Act was codified in Title 17 of the U.S. Code. See Act of July 30, 1947 (1947 Act), ch. 391, § 116, 61 Stat. 665.

In 1976, when enacting a substantial revision of copyright law, Congress made costs discretionary rather than mandatory but left essentially unchanged the existing language authorizing attorney's-fee awards. See Copyright Act, Pub. L. No. 94-553, Tit. I, § 505, 90 Stat. 2586; see also *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 523 (1994). That provision, which has not subsequently been amended, states that in a copyright action, "the [district] court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof." 17 U.S.C. 505. It further states that, "[e]xcept as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." *Ibid.*

b. In *Fogerty*, this Court considered "what standards should inform a court's decision to award attorney's fees" under Section 505 "to a prevailing defendant in a copyright infringement action." 510 U.S. at 519. The underlying infringement suit in *Fogerty* had culminated in a jury verdict for the defendant, who then sought to recoup the fees that he had incurred. *Id.* at 520. The Court held that, unlike the fee-shifting provisions of the Civil Rights Act of 1964 and some other federal statutes, Section 505 is not intended to treat prevailing plaintiffs more favorably than prevailing defendants. *Id.* at 524-527, 533. The Court ex-

plained that "it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible," and that "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id.* at 527.

The Court also rejected the contention that Section 505 was intended to adopt the "British Rule," under which "both prevailing plaintiffs and defendants should be awarded attorney's fees as a matter of course." 510 U.S. at 533. Because Congress "legislates against the strong background of the American Rule," under which "parties are to bear their own attorney's fees" absent contrary legislative direction, the Court believed that such "a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment." *Id.* at 533-534.

The Court concluded that, under Section 505, "[p]revailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion." 510 U.S. at 534; see *ibid.* ("There is no precise rule or formula for making these determinations.") (citation omitted). In a footnote, the Court stated that "courts following the evenhanded standard have suggested several nonexclusive factors to guide courts' discretion," including "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* at 534 n.19 (quoting *Lieb* v. *Topstone Indus., Inc.*, 788

F.2d 151, 156 (3d Cir. 1986)). The Court "agree[d] that such factors may be used to guide courts' discretion, so long as such factors are faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner." *Ibid.*

2. a. Respondent publishes academic textbooks for sale in domestic and international markets. Pet. App. 32a-34a. Petitioner arranged for his friends and family in Thailand to purchase editions of respondent's textbooks that were manufactured abroad. *Id.* at 34a. He then imported the purchased copies into the United States and resold them in this country for a profit. *Ibid.*

Respondent sued in the Southern District of New York, alleging that petitioner had infringed respondent's copyrights by importing textbooks made and purchased abroad without respondent's authorization. See 17 U.S.C. 106(3) (copyright owner's exclusive right "to distribute copies" of a copyrighted work); 17 U.S.C. 602(a)(1) (defining as infringement of the right granted by Section 106(3) the unauthorized importation into the United States "of copies * * * of a work that have been acquired outside the United States"). In response, petitioner asserted the first sale defense, under which "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. 109(a). The district court held that the defense was unavailable because foreign-manufactured goods are not "lawfully made under" Title 17, and the jury found petitioner liable for

$600,000 in statutory damages. Pet. App. 35a. The court of appeals affirmed. *Id.* at 35a-36a.

This Court reversed. Pet. App. 29a-113a. Resolving an issue on which the Court had previously split 4-4, see *Costco Wholesale Corp.* v. *Omega, S.A.*, 562 U.S. 40 (2010) (per curiam), the Court held that "the 'first sale' doctrine applies to copies of a copyrighted work lawfully made abroad." Pet. App. 32a. Justice Ginsburg, joined by Justice Kennedy and (in large part) by Justice Scalia, dissented. *Id.* at 74a.

b. After the Second Circuit entered judgment on remand, Pet. App. 25a-28a, petitioner requested an award of fees under 17 U.S.C. 505 for all phases of the litigation, see Pet. App. 16a n.14 (noting that petitioner sought more than $2 million in fees). The district court denied petitioner's request. *Id.* at 6a-24a.

Relying on *Fogerty*, the district court stated that "[t]he touchstone" of the Section 505 inquiry is whether an award of fees "will further the interests of the Copyright Act," including clear demarcation of "the boundaries of copyright law" to "maximize the public exposure to valuable works." Pet. App. 9a-10a (quoting *Fogerty*, 510 U.S. at 527, and *Mitek Holdings, Inc.* v. *Arce Eng'g Co.*, 198 F.3d 840, 842-843 (11th Cir. 1999)). The court explained that, in the wake of *Fogerty*, the Second Circuit had "emphasized in particular the importance of the objective unreasonableness" of the losing party's position "in guiding the court's discretion as to whether to award attorney's fees." *Id.* at 10a (citing *Matthew Bender & Co.* v. *West Publ'g Co.*, 240 F.3d 116 (2d Cir. 2001)); see *id.* at 10a n.9 (collecting cases). The district court also observed that, under Second Circuit precedent, "other factors may, in some circumstances, outweigh the objective

unreasonableness factor and lead the court to conclude that equity supports a fee award." *Id.* at 13a.

The district court concluded that respondent's infringement claim "was not unreasonable" and that "no other equitable consideration weigh[ed] in favor" of a fee award. Pet. App. 8a. Addressing the considerations noted by this Court in *Fogerty*, the district court explained that respondent's claim "was clearly not frivolous"; that respondent's "motivation was not inappropriate"; that respondent "did not engage in any conduct that equity suggests should be deterred in the future"; and that, "[w]ith regard to compensation, the evidence shows that [petitioner] has not in fact paid, and is not obligated to pay, most of the legal fees sought" and "may now continue his arbitrage business free of the fear of incurring copyright liability." *Id.* at 14a-17a.

The district court also analyzed additional considerations advanced by petitioner in support of his claim for fees. Pet. App. 17a. The court explained that, although this Court's decision in the case had "clarified the boundaries of copyright law," that result was "due as much to [respondent's] risk in bringing the claim as to [petitioner's] successful defense against it." *Id.* at 18a. The court stated that "the degree of success" that petitioner had obtained did not "override" the objective reasonableness of respondent's claim. *Id.* at 20a, 22a. The court also concluded that any "financial disparity" between the parties "does not speak to whether a fee award * * * would further the goals of the Copyright Act," since "it is important to encourage reasonable claims (regardless of a plaintiff's wealth or poverty) as well as meritorious

defenses involving close or novel issues of copyright law." *Id.* at 23a-24a.

c. The court of appeals affirmed the district court's judgment in a brief summary order. Pet. App. 1a-5a. Emphasizing that the standard of review was "highly deferential," the court stated that "[t]he district court is not bound by any 'precise rule or formula'" and should exercise its discretion "in light of the [relevant] considerations," including those noted by this Court in *Fogerty*. *Id.* at 3a (citation omitted; second set of brackets in original). The court of appeals concluded that the district court's "thorough opinion * * * properly placed 'substantial weight' on the reasonableness of [respondent's] position in this case," since imposing fees against a litigant with an "objectively reasonable" position "will generally not promote the purposes of the Copyright Act." *Id.* at 4a (quoting *Matthew Bender*, 240 F.3d at 122).

The court of appeals disagreed with petitioner's contention that the district court had "'fixated' on [respondent's] objective reasonableness at the expense of other relevant factors." Pet. App. 4a (citation omitted). The court of appeals noted the district court's acknowledgment that "other factors may outweigh the objective unreasonableness factor," *ibid.* (citation omitted), and found no abuse of discretion in the district court's "overall conclusion" that those other factors did not justify a fee award "in the circumstances of this case," *id.* at 5a & n.2.[1]

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[1] The court of appeals "respectfully question[ed]" one aspect of the district court's analysis: "the conclusion that considerations of compensation did not favor a fee award because [petitioner] was represented pro bono at the Supreme Court." Pet. App. 5a n.2. In the court of appeals' view, putting weight on that fact could "de-

SUMMARY OF ARGUMENT

A. The Second Circuit's approach to fee-shifting under 17 U.S.C. 505, which treats the objective reasonableness of the losing party's merits position as a particularly significant factor but mandates consideration of all other relevant circumstances as well, reflects a proper understanding of Section 505.

1. Section 505 authorizes district courts to award attorney's fees in copyright cases but does not specify the fee-shifting criteria that courts should apply. In *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994), this Court held that Section 505 must be applied in a manner that is neutral as between plaintiffs and defendants, and it identified certain non-exclusive factors that courts can consider.

2. The Second Circuit's approach to Section 505 is consistent with the Copyright Act's purposes as described in *Fogerty*, with longstanding copyright practice, and with the standards that generally apply under other discretionary federal fee-shifting provisions. By emphasizing the objective reasonableness of the losing party's arguments, that approach deters unreasonable arguments and encourages reasonable ones. Because plaintiffs and defendants are equally capable of making both reasonable and unreasonable arguments, the Second Circuit's approach reflects the even-handedness that *Fogerty* demands.

Beginning in 1909, federal law stated that the district court in a copyright suit "may award" attorney's fees to the prevailing party. When Congress was considering revisions to the copyright laws in 1976, Congress was informed that courts applying that

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crease the future availability of pro bono counsel to impecunious litigants." *Ibid.*

provision generally declined to award fees in cases where the losing side's position was reasonable. Because that pattern of judicial decisions was brought to Congress's attention, Congress's re-enactment in 1976 of substantially similar discretionary language indicates approval of the pre-existing framework. Treating objective reasonableness as a particularly significant factor is also consistent with usual understandings of other discretionary fee-shifting provisions. And that approach is highly workable, since the district court in assessing the reasonableness of the losing side's arguments can draw on its prior experience in adjudicating the case on the merits.

3. Contrary to petitioner's contentions, the Second Circuit's approach leaves district courts with adequate discretion and is fully consistent with *Fogerty*. The Second Circuit has consistently recognized that, although the reasonableness of the losing side's position weighs substantially against a Section 505 fee award, the district court should consider all relevant factors and will sometimes be justified in awarding fees even when the losing party's arguments were reasonable. The Second Circuit's standard is facially neutral as between plaintiffs and defendants, and petitioner fails to substantiate his contention that courts within the circuit have applied that standard in a skewed fashion.

B. Petitioner contends that fees under Section 505 should routinely be awarded in cases that ultimately produce important appellate precedents. That approach should be rejected.

1. Nothing in *Fogerty*—a case in which the underlying infringement suit did not produce any precedential opinion at all on the merits of the infringement issue—supports petitioner's approach. Rather, the

Court in that case simply recognized that the successful defense of an infringement suit can serve the Copyright Act's purposes by enabling the defendant to exploit the expressive work that was (wrongly) alleged to be infringing. Petitioner's approach logically suggests that Copyright Act fees should be more readily awarded in cases where appeals are taken (since only an appellate court can issue a precedential opinion); but petitioner cites no case law drawing that distinction under Section 505 or any other federal fee-shifting provision. And because a court's rejection of unreasonable arguments simply reaffirms (rather than meaningfully clarifies) the contours of copyright law, petitioner's approach would have the peculiar effect of treating the reasonableness of the losing side's position as a factor *favoring* a fee award.

2. Even if this Court views the generation of copyright precedent as a specific objective of Section 505, it is wholly unclear whether adoption of petitioner's proposed fee-shifting approach would have that effect. Under petitioner's approach, each litigant in a close case would have greater cause for optimism that it could recoup its own fees if it prevailed, but also greater cause for concern that it would be required to pay its adversary's fees if it lost. It is entirely speculative whether the incentive or disincentive effects of such a regime would predominate.

3. Petitioner's proposed standard would be difficult to administer. Whereas the district court's prior experience in adjudicating a case on the merits will bear directly on the determination whether the losing side's arguments were reasonable, the court may have no particular insight into the jurisprudential or practical significance of any subsequent ruling on appeal.

C. The judgment of the court of appeals should be affirmed, since the district court did not abuse its discretion in declining to award fees in this case. The district court's analysis of the relevant factors, and its ultimate conclusion that a fee award was not warranted, reflected a sound exercise of discretion under an appropriate legal standard.

ARGUMENT

A. The Second Circuit's Interpretation Of Section 505 Is Correct

1. Under the "American Rule," the "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975); see *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994). "[T]he circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska Pipeline*, 421 U.S. at 262.

The Copyright Act provides that a district court "may * * * award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. 505. "The word 'may'" in Section 505 "clearly connotes discretion." *Fogerty*, 510 U.S. at 533. Courts considering fee petitions under Section 505 thus have significant latitude to decide whether fees are justified under the circumstances of a particular case. See *id.* at 534.

Although Section 505 does not establish any "precise rule or formula" for determining whether fees should be awarded in a particular case, *Fogerty*, 510 U.S. at 534 (citation omitted), "in a system of laws discretion is rarely without limits." *Independent*

Fed'n of Flight Attendants v. *Zipes*, 491 U.S. 754, 758 (1989). In *Fogerty*, this Court cited with approval "several nonexclusive factors"—"frivolousness, motivation, objective unreasonableness (both in the factual and the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence"—that lower courts had considered relevant to a district court's exercise of discretion under Section 505. 510 U.S. at 534 n.19 (citation omitted); see *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 n.6 (2014) (citing *Fogerty*'s list of factors). The *Fogerty* Court explained that "such factors may be used to guide courts' discretion," so long as they are "faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner." 510 U.S. at 534 n.19; see generally *Zipes*, 491 U.S. at 758, 760-761.

In identifying the Copyright Act's "purposes," the *Fogerty* Court explained that "copyright law ultimately serves the purpose of enriching the general public through access to creative works." 510 U.S. at 527. The Court deemed it "peculiarly important that the boundaries of copyright law be demarcated as clearly as possible," and it explained that "a successful defense of a copyright infringement action" serves "that end * * * every bit as much as a successful prosecution of an infringement claim." *Ibid.* For that reason, "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Ibid.*

2. In determining whether attorney's fees should be awarded under Section 505, the Second Circuit correctly gives "substantial weight" to the objective reasonableness of the losing side's position, while recognizing that other relevant circumstances may support a fee award even when the losing party's position was reasonable. Pet. App. 4a-5a. At least three of the factors identified as relevant in *Fogerty*—"frivolousness," "objective unreasonableness," and the need for "deterrence," 510 U.S. at 534 n.19—are directly implicated when the losing party's litigating position was unreasonable. The Second Circuit's approach serves the purposes of the Copyright Act, is in keeping with long-established practice in copyright cases, harmonizes the interpretation of Section 505 with judicial interpretations of other fee-shifting provisions, and ensures that district courts can workably administer Section 505.[2]

a. The Second Circuit's approach furthers the purposes of the Copyright Act.

Emphasizing the objective reasonableness of the losing side's position creates appropriate litigating incentives. In cases where one party's position is clearly correct, that fee-shifting approach gives the party greater confidence that it can economically litigate the case to its conclusion, thereby achieving the result to which it is entitled under the Copyright Act. The Second Circuit's approach also deters the assertion of unreasonable litigating positions, and the

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[2] As petitioner recognizes (Pet. Br. 50-52), the approach taken by the Fifth and Seventh Circuits, which presume (at least in certain circumstances) that the prevailing party is entitled to an award of fees under Section 505, is inconsistent with *Fogerty*'s rejection of the British Rule, see 510 U.S. at 533.

continued assertion of such positions after their lack of merit has been demonstrated. At the same time, it avoids the undue disincentive to the assertion of reasonable litigating positions, and the concomitant pressure to settle or abandon potentially meritorious claims or defenses, that might result if losing copyright litigants were routinely required to pay their opponents' fees.

Deterrence of unreasonable arguments and encouragement of reasonable ones is a fully "evenhanded" approach. *Fogerty*, 510 U.S. at 534 n.19. The question whether a litigating position is objectively unreasonable may be asked equally of both sides. Accordingly, neither plaintiffs nor defendants are favored, and each is "encouraged to litigate * * * to the same extent." *Id.* at 527; see, *e.g.*, *Bauer* v. *Yellen*, 375 Fed. Appx. 154, 156-157 (2d Cir. 2010) (upholding decision to award fees to prevailing defendant when the losing plaintiff's position was not objectively reasonable); *Mallery* v. *NBC Universal, Inc.*, 331 Fed. Appx. 821, 823 (2d Cir. 2009) (same), cert. denied, 559 U.S. 1101 (2010); *Bryant* v. *Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir.) (affirming denial of fee award to prevailing plaintiffs where losing defendants made objectively reasonable arguments), cert. denied, 562 U.S. 1064 (2010); Resp. Br. 45; see generally *Matthew Bender & Co.* v. *West Publ'g Co.*, 240 F.3d 116, 121 (2d Cir. 2001) ("the standard governing the award of attorneys' fees under section 505 should be identical for prevailing plaintiffs and prevailing defendants").

The Second Circuit's approach preserves flexibility. Cases may arise in which the purposes of the Copyright Act will be best served by requiring a losing party who advanced a reasonable position to pay

the prevailing party's fees. Because the Second Circuit treats the objective reasonableness of the losing party's position as a factor entitled to "substantial weight," rather than as a categorical bar to a fee award, courts retain discretion to award fees in such cases. See, *e.g.*, *Viva Video, Inc.* v. *Cabrera*, 9 Fed. Appx. 77, 80 (2d Cir. 2001) (addressing abusive litigation conduct by party with objectively reasonable position).

b. The Second Circuit's identification of objective reasonableness as a central factor in the fee analysis is also consistent with longstanding Copyright Act practice. The sequence of events that led to the enactment of Section 505 in 1976 strongly suggests that Congress intended to ratify that practice.

The Copyright Act of 1909 provided that "the court may award to the prevailing party a reasonable attorney's fee as part of the costs." § 40, 35 Stat. 1084. In 1947, when the Copyright Act was codified in Title 17 of the U.S. Code, that language was retained without change. See 1947 Act, § 116, 61 Stat. 665.

When Congress subsequently undertook a "general revision of the copyright law," it authorized the Copyright Office to study possible legislative approaches, and that Office assumed substantial responsibility for drafting the proposals that became the 1976 Act. *Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 159 (1985); see *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 743-748 (1989). The Office issued a series of "studies on major issues of copyright law." *Mills Music*, 469 U.S. at 159. One of those studies explained that courts applying the then-extant copyright fee-shifting provision "do not usually make an allowance at all if an unsuccessful plaintiff's claim was

not 'synthetic, capricious or otherwise unreasonable,' or if the losing defendant raised real issues of fact or law." *Fogerty*, 510 U.S. at 528, 531 (quoting Ralph S. Brown, Jr., *Study No. 23, The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study, reprinted in* Staff of the Subcomm. on Patents, Trademarks, and Copyrights, House Comm. on the Judiciary, 86th Cong., 2d Sess., *Copyright Law Revision: Studies* 85 (Comm. Print 1960) (Brown Study)); see Brown Study 85 ("Several experienced practitioners said that they seldom received fee allowances, nor were their clients compelled to pay allowances, because the only cases they took to court involved unsettled questions of law or fact, and they did not expect the court to make an allowance to either side."); see also *Fogerty*, 510 U.S. at 528-529 (discussing additional Copyright Office study relevant to attorney's fees). The Register of Copyrights expressed the same understanding, stating that "[t]he courts have generally denied awards of attorney's fees where the losing party had solid grounds for litigating his claim or defense." *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 109 (Comm. Print 1961) (House Comm. on the Judiciary, 87th Cong., 1st Sess.).[3]

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[3] This Court's decision in *Fogerty* cited a number of pre-1976 cases, all of which are consistent with the Copyright Office's summary. See *Fogerty*, 510 U.S. at 529-532 nn.14-17 (citing, *e.g.*, *Official Aviation Guide Co.* v. *American Aviation Assocs.*, 162 F.2d 541, 543 (7th Cir. 1947) (denying fees where the case "was hard fought and prosecuted in good faith, and * * * presented a complex problem in law"), and *Loew's Inc.* v. *Columbia Broad. Sys., Inc.*, 131 F. Supp. 165, 186 (S.D. Cal. 1955) (denying fees to prevailing defendant where merits issue "was a nice one" and there were "no authorities squarely in point"), aff'd, 239 F.2d 532

When it enacted Section 505 as part of the 1976 Act, Congress thus was made aware that the reasonableness of the losing party's position on the merits was a significant factor in the discretionary analysis under earlier provisions authorizing awards of attorney's fees in copyright cases. See *Mills Music*, 469 U.S. at 159-160 (noting importance of Copyright Office studies and views in the enactment of the 1976 Act); see also *Fogerty*, 510 U.S. at 523-524. Congress chose not to "amend the neutral language" under which that approach had developed. *Fogerty*, 510 U.S. at 524 n.11. With respect to fees, Congress retained the existing language even though the 1976 Act changed another aspect of the cost-shifting regime, by making an award of non-fee costs discretionary rather than mandatory. Compare 17 U.S.C. 116 (1976) ("full costs shall be allowed"), with 17 U.S.C. 505 ("the court in its discretion may allow the recovery of full costs"); see generally *Community for Creative Non-Violence*, 490 U.S. at 743 (noting that in most respects the 1976 Act "almost completely revised existing copyright law").

Under those circumstances, "Congress is presumed * * * to adopt" the existing "judicial interpretation" of the statutory language it re-enacts. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). That principle applies with special force where, as here, Congress has left the relevant language intact while significantly altering closely related aspects of the statute. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982). Treating the objective reasonableness of the losing side's argu-

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(9th Cir. 1956), aff'd, 356 U.S. 43 (1958)); see also *Norbay Music, Inc.* v. *King Records, Inc.*, 249 F. Supp. 285, 289-290 (S.D.N.Y. 1966); Resp. Br. 25 & n.3 (citing additional cases).

ments as a factor weighing substantially against a Copyright Act fee award thus comports with the "usual[]" outcomes that Congress would have expected when it enacted Section 505. See *Fogerty*, 510 U.S. at 531 (quoting Brown Study 85).[4]

c. The Second Circuit's approach is also consistent with usual understandings of discretionary fee-shifting provisions outside the copyright context.

Under a wide array of discretionary federal fee-shifting provisions, the reasonableness of the losing side's position is consistently treated as a factor weighing against an award. The Court has applied that approach in construing provisions (like Section 505) that authorize fee awards but provide little or no explicit guidance as to the criteria that should inform the court's decision. See, *e.g.*, *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (explaining that "when an objectively reasonable basis [for the losing litigant's action] exists, fees should be denied") (interpreting 28 U.S.C. 1447(c)); *Octane Fitness*, 134 S. Ct. at 1756 (explaining that "the unreasonable manner in which the case was litigated" may inform a court's decision whether to award fees) (interpreting 35 U.S.C. 285).[5] Courts have interpreted such provi-

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[4] In *Fogerty*, this Court rejected the argument that the 1976 Congress had ratified the "dual" standard for fees, which treated plaintiffs more favorably than defendants. See 510 U.S. at 527-533. The Court explained that "neither of the two studies presented to Congress, nor the cases referred to by the studies, support [the] view that there was a settled construction in favor of the 'dual standard' under" pre-1976 law. *Id.* at 533.

[5] See also, *e.g.*, *American Council of Certified Podiatric Physicians & Surgeons* v. *American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 625 (6th Cir. 1999) (explaining that, "[w]here a plaintiff sues under a colorable, yet ultimately losing, argument, an award

sions—which are enacted against the "strong background of the American rule," *Fogerty*, 510 U.S. at 533—to "demand some scope for the exercise of discretion to measure the reasonableness of the losing party's conduct and make no award if that conduct was reasonable." Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651, 670 (1982); see 1 Mary Frances Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* ¶ 5.02 [1], at 5-4 (2015).

The wording of 28 U.S.C. 1447(c), the provision at issue in *Martin*, is particularly similar to that of Section 505. Section 1447(c) provides that, if a state-court suit is removed to federal court but subsequently remanded to state court, the "order remanding the case may require payment of * * * attorney fees, incurred as a result of the removal." Like Section 505, that provision uses the permissive word "may" without specifying the criteria that should inform the court's exercise of discretion. The Court in *Martin* held that, "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." 546 U.S. at 141. The Court recognized that district courts could depart

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of attorney's fees is inappropriate") (interpreting 15 U.S.C. 1117(a) (1994 & Supp. V 1999)); *Ahng* v. *Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996) (explaining that "attorney's fees should not be awarded if the losing party's position is substantially justified and taken in good faith") (interpreting 29 U.S.C. 1132(g)(1)) (citation and internal quotation marks omitted); *Tax Analysts* v. *United States Dep't of Justice*, 965 F.2d 1092, 1096 (D.C. Cir. 1992) (affirming denial of fees where the government's position, while not prevailing, "had a reasonable basis in law") (interpreting 5 U.S.C. 552(a)(4)(E) (1988)).

from that rule in unusual cases, but cautioned that the grounds for any such departure "should be 'faithful to the purposes' of awarding fees under § 1447(c)." *Ibid.* (quoting *Fogerty*, 510 U.S. at 534 n.19). The Second Circuit's approach to fee awards under Section 505 is substantially similar.

Petitioner views *Martin* as inapposite because the Court in that case focused on the policy balance that Section 1447(c) is intended to strike. See Pet. Br. 34-35. But there is no sound reason to regard the balancing of interests that the Court in *Martin* described—*i.e.*, deterring unreasonable or ill-motivated removals, without unduly discouraging removals that are reasonable but not certain to succeed, see 546 U.S. at 140-141—as different in kind from the objectives that underlie Section 505. That is particularly so because the Court in *Martin* did not cite legislative history of Section 1447(c), or any other extrinsic statute-specific evidence, in concluding that Congress intended to strike that policy balance. Rather, the Court inferred that intent from Congress's decision to authorize, but not require, awards of fees to plaintiffs in remanded cases. See *ibid.*[6]

d. Treating the reasonableness of the losing party's position as a central factor in the Section 505 inquiry is also a highly workable approach. A district

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[6] Unlike Section 505, Section 1447(c) is not even-handed: it authorizes an award of fees where the defendant's attempt to remove a case is ultimately unsuccessful, but not where the defendant successfully resists the plaintiff's effort to have the case remanded to state court. Nothing in *Martin* suggests, however, that this aspect of the provision meaningfully influenced the Court's articulation of the criteria that should inform district courts' fee decisions.

court that has presided over the merits portion of a copyright case has carefully probed each side's arguments and is well situated to assess whether the losing party advanced a reasonable position. And the question whether a losing party's position is objectively unreasonable may be asked in every case, no matter the kind of claims or defenses involved. The Second Circuit's standard therefore gives district courts clear and administrable guidance that will increase the consistency of fee determinations in similar cases. See *Fogerty*, 510 U.S. at 534 n.19 (referring to "factors" that "may be used to guide courts' discretion"); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975).

3. a. Petitioner argues (Pet. Br. 23) that the Second Circuit's standard "improperly pretermits district court discretion." That criticism is unfounded.

By selecting one of the factors listed in *Fogerty* as a central element in "guid[ing] courts' discretion" under Section 505, *Fogerty*, 510 U.S. at 534 n.19, the Second Circuit has followed this Court's direction, not flouted it. *Fogerty* made clear that such guidance is permissible so long as the factor is an appropriate one. See *ibid.*; cf. *Zipes*, 491 U.S. at 760-761 (stating that "the law in general, and the law applied to" an attorney's-fee provision in the civil rights laws affording district courts facially unqualified "discretion," does not "interpret a grant of discretion to eliminate *all* 'categorical rules'"); *Martin*, 546 U.S. at 139-140 (quoting *Zipes* and applying the same principle). And because the Second Circuit has consistently recognized that fee awards under Section 505 may sometimes be appropriate even when the losing party's position was objectively reasonable, see, *e.g.*, Pet.

App. 4a-5a, its approach is consistent with this Court's avoidance of single-factor tests in similar statutory contexts.

Petitioner asserts (Pet. Br. 24-25) that the Second Circuit has "repeatedly" denied fee requests in copyright cases "based solely on the determination that the losing plaintiff's position was objectively reasonable." But in the cases that he cites "affirm[ing] district court decisions denying attorney's fees to prevailing defendants" (Pet. Br. 24 & n.2), the court of appeals made clear that multiple factors are relevant to the Section 505 analysis.[7] And the two rulings that

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[7] See *Viva Video*, 9 Fed. Appx. at 81 (partially affirming denial of fee award where losing plaintiff's case "had some support at the time it was initiated" and plaintiff did not generally display bad faith, despite ultimately being "unable to support its claims," but partially vacating order after concluding that prevailing defendants were eligible for fees arising out of particular instance of litigation misconduct); see also *Russian Entm't Wholesale, Inc.* v. *Close-Up Int'l, Inc.*, 482 Fed. Appx. 602, 607 (2d Cir. 2012) (observing that losing plaintiff's arguments "were neither legally nor factually unreasonable," and that the district court "could reasonably have considered" the plaintiff's "purported rejection of a reasonable settlement offer" when deciding whether to award fees); *Arista Records, LLC* v. *Launch Media, Inc.*, 344 Fed. Appx. 648, 650-651 (2d Cir. 2009) (explaining that the losing plaintiff's position was not objectively unreasonable, and that "there appears to be no illegal motivation on the part of [the plaintiff] to bring the suit, nor any conduct that would merit deterrence"); *Lava Records, LLC* v. *Amurao*, 354 Fed. Appx. 461, 462 (2d Cir. 2009) (concluding that the district court appropriately denied fees to a prevailing defendant "in light of, *inter alia*, the evidence plaintiffs possessed pointing to [defendant] as the infringing party prior to filing suit" and defendant's "less-than-candid responses to plaintiffs' discovery requests"); *Medforms, Inc.* v. *Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 117 (2d Cir. 2002) (affirming denial of fees where the

he claims "reversed district court decisions awarding attorney's fees to prevailing defendants * * * based solely on the court's determination that the plaintiff's litigation position was objectively reasonable" (Pet. Br. 25 & n.3 (emphasis omitted)) did no such thing. Indeed, in one of those cases, the court of appeals—while vacating an existing fee award infected by "logically inconsistent" reasoning—remanded for the district court to consider whether the plaintiff's "[m]isconduct before or during litigation" might warrant an award of fees to the prevailing defendants even though the plaintiff's position on the facts and law in the operative complaint "was objectively reasonable." *Zalewski* v. *Cicero Builder Dev., Inc.*, 754 F.3d 95, 108-109 (2d Cir. 2014) (citation omitted); see *Effie Film, LLC* v. *Murphy*, No. 14-3367-cv, 2015 WL 6079993, at *1-*2 (2d Cir. Oct. 16, 2015) (ruling that district court's award of fees to a plaintiff that had obtained a declaratory judgment of non-infringement constituted an abuse of discretion because the fee award was "based * * * solely" on the mistaken belief that the "*pro se*" defendant's arguments were unreasonable).

Petitioner is also wrong in accusing (Pet. Br. 25-27) the Second Circuit of effectively adopting an "exceptional case" standard similar to that expressly set forth in the attorney's-fee provisions of the Patent Act, 35 U.S.C. 1 *et seq.*, and the Lanham Act, 15 U.S.C. 1051 *et seq.* As this Court explained in *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), when the "power" to award attorney's fees is "reserved for 'exceptional' cases," a court must

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district court "rel[ied] on factors outlined by the Supreme Court in *Fogerty*").

ask whether the case before it "stands out from others with respect to the substantive strength of a party's litigating position * * * or the unreasonable manner in which the case was litigated." *Id.* at 1756; see *id.* at 1753 (explaining that addition of the word "exceptional" to the Patent Act did not alter the meaning of the existing provision). Giving substantial weight in an attorney's-fee analysis to the reasonableness of the losing party's position does not call for any such comparison between cases, or reserve an award of fees for cases that stand out from the norm. Rather, it calls for a case-specific assessment of whether the losing party's position lacks a basis in fact or law—regardless of whether any such unreasonableness is ordinary or exceptional in nature.

b. Petitioner asserts that the Second Circuit's standard "flouts *Fogerty*'s evenhandedness requirement" by adopting a "punishment-based approach" under which "a defendant who has infringed will virtually always be found to have done something culpable" while "a plaintiff who wrongly accuses a defendant of infringement will be viewed as culpable only if the lawsuit is frivolous." Pet. Br. 27, 29 (emphasis omitted). That is incorrect.

Petitioner's argument confuses the question of infringement liability with the reasonableness of a party's litigating position. As in other litigation contexts, the defendant in a copyright-infringement suit may lose on the merits yet be found to have advanced objectively reasonable arguments. Courts in the Second Circuit have denied Section 505 fee requests on that basis. See, *e.g.*, *Bryant*, 603 F.3d at 144. To be sure, because a finding of infringement indicates that the defendant has violated the law, a losing copyright

defendant is "culpable" in a way that a losing plaintiff is not. That difference explains why losing defendants, but not losing plaintiffs, may be required to pay damages at the conclusion of infringement suits. Consistent with *Fogerty*'s holding that Section 505 mandates an even-handed approach, however, the Second Circuit has not treated that form of culpability as a basis for a fee award.

Relying on a small number of secondary sources, petitioner contends that the Second Circuit's standard unduly favors plaintiffs in practice. Even if petitioner could identify cases other than this one in which the Second Circuit (or district courts within that circuit) have failed to apply an even-handed approach, that showing would provide no basis for reversing the judgment below or for rejecting the standard that the Second Circuit has articulated. In any event, the sources that petitioner cites do not support his characterization.

Petitioner relies (Pet. Br. 28-29) on a survey published in 2000 that considered 135 decisions issued "in a fifty-two month period following" this Court's 1994 decision in *Fogerty*. Jeffrey Edward Barnes, Comment, *Attorney's Fee Awards in Federal Copyright Litigation After* Fogerty *v.* Fantasy*: Defendants Are Winning Fees More Often, but the New Standard Still Favors Prevailing Plaintiffs*, 47 UCLA L. Rev. 1381, 1387 (2000) (Barnes Comment); see *id.* at 1403; see also Pet. Br. 28 (citing John Tehranian, *Curbing Copyblight*, 14 Vand. J. Ent. & Tech. L. 993, 1016 (2012) (relying on Barnes Comment)). But that survey found that "the frequency of prevailing defendants' fee awards jumped from 16 percent before *Fogerty* to 61 percent following the ruling," and

that the increase in the Second Circuit (from 12.5% to 80%) was particularly striking. Barnes Comment 1383, 1390-1391 (Tbl. 1); see *id.* at 1383 (stating that rates of fee awards to plaintiffs "remained the same" throughout this period at 89%).[8]

Petitioner also relies (Pet. Br. 28-29) on a copyright treatise stating that a standard emphasizing objective reasonableness perpetuates "the dual system rejected in *Fogerty*." But the treatise primarily rests that statement on what it deems a faulty conception of unreasonableness—one that is too close to the "frivolous[ness]" or "bad faith" that the dual standard required prevailing defendants to demonstrate in order to obtain a fee award. *Fogerty*, 510 U.S. at 520-521; see William F Patry, 6 *Patry on Copyright* § 22:210 (2015) (citing *Browne* v. *Greensleeves Records, Ltd.*, No. 03 Civ. 7696, 2005 WL 2716568, at *1 (S.D.N.Y. Oct. 21, 2005) (stating that claims are "generally" objectively unreasonable only if they "are clearly without merit or otherwise patently devoid of legal or factual basis")). The numerous cases in which Section 505 fees have been awarded (and fee awards affirmed) by courts in the Second Circuit suggest that a showing of objective unreasonableness is not overly difficult to make. And even if courts in the Second Circuit were unduly reluctant to find particular litigating positions

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[8] A somewhat higher rate of fee awards to prevailing plaintiffs than to prevailing defendants does not indicate a failure of even-handedness. Defendants are brought into court unwillingly, while plaintiffs can evaluate the legitimacy of their claims before committing the time and resources required to initiate a federal suit. Accordingly, a standard that tests all parties' positions against the same objective-reasonableness yardstick may result in a greater prevalence of fee awards to plaintiffs.

objectively unreasonable, that fact would not suggest that the standard itself is flawed or that plaintiffs and defendants are being treated differently. Respondent's merits position in this case, which prevailed in both lower courts and was endorsed by three Members of this Court, was objectively reasonable under any plausible conception of that term.

B. Petitioner's Interpretation Of Section 505 Should Be Rejected

Petitioner agrees (Pet. Br. 14-17, 35-36, 48-49, 52-53) that a court's discretion to award fees may appropriately be "guided by a touchstone," and that the reasonableness of the losing party's litigating position may properly bear on the Section 505 analysis. He contends, however, that district courts should exercise their discretion under Section 505 to reward the victors in close cases that yield important judicial pronouncements—an approach that he believes would encourage "meaningful[] clarifi[cation]" of copyright law. *Id.* at 19-21, 35-50. That approach suffers from numerous flaws.

1. Petitioner's approach finds no support in *Fogerty*. The Court there stated that, because "the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement," a determination that particular expression is *not* infringing serves the Act's purposes just as much as a decision that upholds a copyright-holder's claim. 510 U.S. at 526; see *id.* at 525-527. The Court explained that, "[i]n the case before [it], the successful defense of 'The Old Man Down the Road' [the song that was alleged to be infringing] increased public exposure to a musical work that could, as a result, lead to further

creative pieces." *Id.* at 527. In stating that "a successful defense of a copyright infringement action may further the policies of the Copyright Act," *ibid.*, the Court thus focused on the fact that the *judgment* in the underlying infringement suit had enabled the defendant to exploit a particular creative work, not on any more general law-clarifying effect that a precedential opinion might produce. Indeed, because the infringement suit in *Fogerty* culminated in a jury verdict for the defendant that the plaintiff did not appeal, see *id.* at 520, the suit did not generate a precedential opinion on *any* question concerning the merits of the infringement claim.

Petitioner's focus on the precedent-setting effect of the Court's merits-stage decision in this case logically suggests that Copyright Act fees should be more readily awarded in cases involving an appeal of a district court's merits decision (at least if the appellate court issues a published decision), and even more readily awarded in cases that reach this Court. Cf. Pet. Br. 41 ("The truth is some wins are better than others."). Nothing in the text of Section 505 indicates that appellate victories provide a stronger basis for a fee award than unappealed trial-court wins, however, and the government is not aware of any judicial decision that has endorsed that distinction. Petitioner also identifies no other federal fee-shifting provision under which the creation of appellate precedent is treated as a factor supporting a fee award.

Petitioner's approach would also have the peculiar effect of treating the reasonableness of the losing side's merits position as a factor *favoring* a fee award. In stressing the jurisprudential significance of the Court's merits decision in this case, petitioner affirm-

atively relies on the fact that, before that decision, most courts and commentators had believed respondent's position to be correct. See Pet. Br. 2, 7; but cf. *id.* at 49 (accepting that fee awards are warranted if the losing party's position is frivolous). By contrast, because unreasonable arguments are (by definition) those that litigants should already know are wrong, their rejection—even in a published opinion—is unlikely to serve any meaningful law-clarifying function. That treatment of the reasonableness factor is impossible to square with *Fogerty*, which contemplates that a losing argument's "objective unreasonableness" will weigh in favor of a fee award, and it is in stark contrast with the role that objective reasonableness ordinarily plays under other discretionary federal fee-shifting statutes. *Fogerty*, 510 U.S. at 534 n.19 (citation omitted); see pp. 19-21, *supra*.

2. Even if Congress intended in Section 505 to encourage litigation of potentially precedent-setting cases, petitioner's approach to fee awards would not reliably effectuate that intent.

In deciding whether to proceed to judgment in the district court or to pursue and fully litigate an appeal, each party can be expected to view the possible recoupment of its own fees as an incentive to go forward, while regarding the risk of a fee award against it as a cause for hesitation. A regime under which fees are routinely awarded in precedent-setting copyright litigation thus could discourage as well as encourage the pressing of arguments on appeal. The problem is not simply that precedent-setting litigation requires two willing parties, and that the party that ultimately loses might have abandoned the suit if the perceived risk of an adverse fee award had been higher. See

Pet. Br. 30. In addition, the rule that petitioner advocates would deter many litigants who would otherwise have pursued appeals *and would ultimately have prevailed.* See Resp. Br. 33.

The circumstances of this case illustrate the difficulties with petitioner's approach. If petitioner's proposed fee-shifting framework had been in place when he was deciding whether to petition for certiorari, he would have faced strong disincentives to seeking this Court's review. In petitioner's telling (Pet. Br. 2, 7, 9, 11), litigation in this Court was a "long-shot" campaign against a "copyright goliath" represented by elite counsel. And because petitioner's Supreme Court counsel had agreed to provide pro bono representation, the prospect of having his own fees reimbursed would have been little incentive to proceed. By contrast, the risk of having to pay respondent's fees as a consequence of losing, notwithstanding the reasonableness of petitioner's arguments, could well have deterred him from pursuing this Court's review at all. At that stage of the proceedings, it would hardly have been obvious even to petitioner himself that he would ultimately land among "the Kirtsaengs" (Pet. Br. 3) of copyright litigation.

This is not to say that adoption of petitioner's approach would *demonstrably* reduce the overall incidence of law-clarifying copyright litigation. The point is simply that the approach would create disincentives as well as incentives to pursuing cases on appeal, and it is wholly speculative whether the incentive effects would predominate. Thus, even if this Court views the generation of copyright precedent as an objective of Section 505, there is no sound reason to believe that

petitioner's proposed fee-shifting standard would have that systemic effect.

3. Petitioner's proposed standard also would be difficult for district courts to administer. Petitioner envisions (Pet. Br. 15, 33, 41-44) that a prevailing party seeking fees would attempt to "demonstrate" the "broad applicability" of the result in its case, while the losing party would try to establish that the case involved merely "localized facts" or that the result only "meaningfully deterred infringement in a particular industry." But the question whether a particular result warrants a fee award under that approach would frequently be subject to conjecture and speculation. It will often be difficult for a district court to assess the precedent-setting value of a decision, or to gauge the effects of that decision on the relevant industry. Indeed, the practical importance of a particular ruling on the merits might not become apparent until long after the court makes its attorney's-fee determination.

In assessing the objective reasonableness of the losing party's arguments, a district court can draw directly on the knowledge that it has acquired during the merits phase of the litigation. See pp. 21-22, *supra*. The district court's experience with the case, however, often will give it no particular insight into the jurisprudential or practical significance of any subsequent ruling on appeal. To assess the ultimate law-clarifying value of the lawsuit, the court may be required to conduct a wide-ranging survey of the pertinent factual and legal landscape, an inquiry extending far beyond what was needed to try the case on the merits. An approach that entails such inquiries would directly implicate the concern that "[a] request

for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983); see *Zipes*, 491 U.S. at 766 (declining to adopt a proposed framework for awarding fees when "making fees turn upon [the proponent's criteria] would violate our admonition" in *Hensley*).

C. The Judgment Of The Court Of Appeals Should Be Affirmed

As the Second Circuit correctly held, the district court's denial of petitioner's request for attorney's fees was not an abuse of discretion. The district court observed (and petitioner does not dispute) that respondent's merits arguments were reasonable, Pet. App. 12a-14a; that respondent had "brought this action based on its belief that, given then-existing legal interpretations of the Copyright Act," petitioner had infringed respondent's rights, *id.* at 17a; that respondent's litigation conduct was appropriate under the circumstances, *id.* at 15a & n.13; and that petitioner had no special need for compensation because he had been represented pro bono in this Court and would be able to "continue his arbitrage business free of the fear of incurring copyright liability," *id.* at 16a. The court also carefully considered each of the additional arguments that petitioner had raised, contra Pet. Br. 3, including the argument that he was entitled to fees because his suit had helped to clarify the law, and determined that "no other factor" justified a fee award, Pet. App. 24a; see *id.* at 17a-24a. The court's analysis of the relevant factors, and its ultimate conclusion that a fee award was not warranted, reflected a sound exercise of discretion under an appropriate legal standard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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